

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Misuse of Internet Protocol (IP)	)	CG Docket No. 13-24
Captioned Telephone Service	)	
	)	
Telecommunications Relay Services	)	
and Speech-to-Speech Services	)	CG Docket No. 03-123
for Individuals with Hearing	)	
and Speech Disabilities	)	

**COMMENTS OF THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

On June 7, 2018, the Federal Communications Commission (Commission) released a *Further Notice of Proposed Rulemaking (FNPRM)*, in which, *inter alia*, it proposed further changes to the rules and compensation structure for the Internet Protocol Captioned Telephone Service (IP CTS) program to ensure that it remains sustainable for those individuals who need it.<sup>1</sup> The Commission published in the Federal Register the *FNPRM* on IP CTS, announcing comment and reply dates.<sup>2</sup> Comments on the *FNPRM* are due on or before September 17, 2018, and reply comments are due on or before October 16, 2018. The Pennsylvania Public Utility Commission (Pa. PUC) submits these comments pursuant to that schedule.

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<sup>1</sup> *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Further Notice of Proposed Rulemaking, and Notice of Inquiry, Docket Nos. CG Docket No. 13-24 and CG Docket No. 03-123, (rel. June 7, 2018) (*FNPRM*).

<sup>2</sup> 83 *Fed. Reg.* 33899.

As an initial matter, these comments should not be construed as binding on the Pa. PUC in any matter before the Pa. PUC. Moreover, the Pa. PUC's position set forth in these comments could change in response to later events, including *Ex Parte* filings, legal proceedings, or other regulatory developments at the state or federal level. Lastly, the instant comments build upon and incorporate by reference prior filings of the Pa. PUC submitted in the above-captioned dockets.

## **I. Introduction And Summary**

IP CTS is a form of telecommunications relay services (TRS) that allows individuals with hearing loss to both read captions and use their residual hearing to understand a telephone conversation. In recent years, use of IP CTS—which is paid for entirely through the Commission's Interstate TRS Fund (TRS Fund)—has grown exponentially. The Commission recognized that as IP CTS usage continues to grow and the contribution base supporting the TRS Fund shrinks, and potential waste in this program poses an ever-increasing threat to the sustainability of IP CTS and all forms of the federal TRS programs.<sup>3</sup> Accordingly, the Commission released a *Report and Order*, *Declaratory Ruling*, *FNPRM*, and *NOI*<sup>4</sup> on IP CTS, which took steps to ensure that IP CTS remains sustainable for those individuals who need it. Among other things, the Commission proposed to reduce waste and bring under control the exponential growth of the program. The Commission also proposed measures to expand the Fund's contribution base to ensure the continued viability of IP CTS for people with hearing loss who need it.<sup>5</sup>

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<sup>3</sup> The Pa. PUC notes that it has experienced a similar growth of the intrastate captioned telephone service that is funded by an intrastate surcharge on landline access lines and a shrinking contribution base.

<sup>4</sup> See *supra* fn 1.

<sup>5</sup> The Pa. PUC comments only address the *FNPRM* portion of the document. In the *Report and Order* and *Declaratory Ruling* portions of the document, the FCC adopted interim IP CTS compensation rates that are projected to save the TRS Fund at least \$399 million over two years, adopted rules to limit unnecessary IP CTS use, and approved use of speech-to-text automation to generate IP CTS captions, taking advantage of technological advances to modernize IP CTS while achieving greater efficiencies. In the *Notice of Inquiry* portion of the document, the FCC sought comment on IP CTS performance goals and metrics to ensure service quality for users.

Specifically, in the *FNPRM*, the Commission seeks comment on the following: (1) measures to ensure fair and efficient provider compensation, including compensation for the provision of IP CTS using fully automated speech recognition (ASR); (2) moving the compensation rate closer to reasonable cost by identifying eligible IP CTS costs; (3) expanding the IP CTS contribution base to include a percentage of annual intrastate revenues from telecommunications carriers and Voice-over-Internet-Protocol (VoIP)<sup>6</sup> service providers; and (4) reducing the risk of providers' signing up ineligible customers and encouraging IP CTS usage regardless of a customer's need for the service.

The Pa. PUC addresses two proposals set forth in the *FNPRM*: (1) expanding the IP CTS contribution base to include a percentage of annual intrastate revenues from telecommunications carriers and VoIP service providers and (2) whether certified state TRS programs should take a more active role in the administration of IP CTS. Upon review, the Pa. PUC believes that certain information is lacking to adequately examine the proposals and therefore, the Pa. PUC is reluctant to support them at this time. Therefore, the Pa. PUC urges the Commission to provide more detailed information on these issues so that the states and interested parties can properly analyze the state impact of contribution base cost allocations and state administration.

The Pa. PUC asserts that the Commission must clarify the legal basis for the states' authority to undertake a more active role in the administration of IP CTS, consistent with cooperative federalism as occurs, for example, in the numbering context and upheld in the courts. *See e.g., In re: Numbering Optimization*, Docket No. 99-200 and *Illinois Public Telecommunications Association v. FCC*, 752 F.3d 1018, 1024 (DC 2014), *cert. denied* 2015 U.S. LEXIS 2047 (March 23, 2015) ("In the absence of an express Congressional directive to the Commission to make certain determinations, the

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<sup>6</sup> VoIP is an Internet application that uses packet switching to transmit a voice communication over a fixed or nomadic broadband Internet connection instead of a regular phone line.

Commission can rely on state determinations.”). Because IP CTS uses the Internet it presents regulatory challenges not associated with the PSTN-based forms of TRS, including cost recovery issues.

Due to the uncertainty regarding the legal classification of VoIP and IP technology by the Commission, the issue of the separation of costs relating to the provision of IP CTS is problematic. In any event, if the Commission seeks to restructure the funding of IP CTS by expanding the IP CTS contribution base to include a percentage of annual intrastate revenues, the Pa. PUC maintains it must first refer this issue to the Federal-State Joint Board on Separations as required by Section 410 of the Communications Act of 1934, as amended (Act), 47 U.S.C. § 410 and Section 225(d)(3)(A) of the Act, 47 U.S.C. § 225(d)(3)(A). Such a referral will ensure compliance with federal law and will ensure that the Commission action is consistent with the current and existing jurisdictional separations procedures. In the absence of that referral, the Pa. PUC is concerned that the proposed methods of calculating the state/federal allocation should not be based on an estimated or assumed 60/40 jurisdictional division as proposed in the *FNPRM*.<sup>7</sup>

Additionally, the Pa. PUC notes that depending on the specific administrative functions that the states would assume, such an assumption of responsibility appears premature, as some states may have to implement new or amend existing legislation in order to assume the functions of administering IP CTS, which essentially is a VoIP service.

Finally, the Commission must address the means whereby states secure the resources to implement any contribution and administrative function envisioned by the Commission. This is needed to avoid imposition of an undesired or unfunded federal

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<sup>7</sup> *FNPRM* at 49-51, para. 104-107.

mandate on state commissions that may already be facing considerable resource constraints.

## **II. Discussion**

IP CTS is a form of TRS that permits an individual who can speak but who has difficulty hearing over the telephone to use a telephone and an Internet Protocol enabled device via the Internet to simultaneously listen to the other party and read captions of what the other party is saying. Generally, IP CTS employs two network paths: A connection via the public switched telephone network (PSTN) or a VoIP service for the voice conversation between the parties to the call and a separate Internet-only connection that transmits the other party's voice from the IP CTS user's phone to a communications assistant (CA) who then transmits captions to the IP CTS user's phone.<sup>8</sup>

When an IP CTS user places or receives a call, he or she is automatically connected to a CA at the same time that the parties to the call are connected. In the most widely-used version of IP CTS, the CA re-voices everything the hearing party says into a speech recognition program, which automatically transcribes the words into captions. In a second version, the CA uses stenography to produce the captions, typing the speech content directly into captions. Today, five providers have certification from the Commission to provide IP CTS. All IP CTS minutes are compensated from the interstate TRS Fund, and, like other forms of Internet-based TRS, IP CTS is entirely administered by the Commission.

IP CTS usage has grown exponentially in recent years. From 2011 to 2017, annual IP CTS minutes have grown from approximately 29 million to 363 million.

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<sup>8</sup> Users may alternatively choose to use a single-line CTS phone or a two-line CTS phone, which do not require an Internet connection to supplement the PSTN connection. The intrastate minutes of use on such phones are, in Pennsylvania, funded by the intrastate TRS surcharge on wireline/landline residential and business access lines.

According to the TRS Fund administrator, in 2018–19, IP CTS will represent approximately 78 percent of the total minutes of TRS compensated by the TRS Fund and about 66 percent of total TRS Fund payments to TRS providers. At the same time, the interstate end-user telecommunication revenue base from which IP CTS and other forms of TRS are supported is steadily declining, raising the threat that over the long term, ever-increasing levels of contribution may not be sustainable. In the *FNPRM*, the Commission seeks comment on how best to fund, administer, and determine user eligibility for this service. The Commission considered, among other issues, the role that state programs and intrastate carriers can play in the provision of and support for IP CTS.

**A. Expansion Of The Contribution Base For IP CTS To Include Intrastate Voice Service Revenues.**

**1. Commission Proposals**

In 2007, for several reasons, the Commission determined that, on an interim basis, all IP CTS would be overseen at the federal level and that all IP CTS minutes, both interstate and intrastate, would be compensated from the Interstate TRS Fund and supported by contributions only from carriers' interstate (and international) end-user revenues.<sup>9</sup> However, the Commission in this *FNPRM* has determined that since this was only meant to be an interim measure to spur the development of the IP CTS program, it now proposes to expand the contribution base for IP CTS to also include a percentage of annual intrastate revenues from telecommunications carriers and VoIP service providers to conform the funding of IP CTS to the requirements of Section 225 of the Act.<sup>10</sup>

To implement its proposal to expand the contribution base for IP CTS to include a percentage of annual intrastate revenues from telecommunications carriers and VoIP

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<sup>9</sup> See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Internet-based Captioned Telephone Service*, Declaratory Ruling, 22 FCC Rcd 379, 379, para. 1 (2007) (*2007 IP CTS Declaratory Ruling*).

<sup>10</sup> 47 U.S.C. § 225.

service providers, the Commission has proposed two different approaches. Under one possible approach, the federal TRS Fund administrator could compute a single contribution factor for IP CTS, which would be applied in the same manner to all end-user revenues, both interstate and intrastate, in effect treating the IP CTS revenue requirement as a single pool to which all federal TRS Fund contributors would pay the same percentage of their total end-user revenues.

Under an alternative approach, the Commission proposes that the IP CTS revenue requirement would be divided into interstate and intrastate portions, based on an estimate of the proportion of IP CTS costs and minutes that are interstate and intrastate, respectively. Separate contribution factors would then be determined for: (1) interstate IP CTS, by dividing the interstate IP CTS revenue requirement by total interstate end-user revenues of all TRS contributors; and (2) intrastate IP CTS, by dividing the intrastate IP CTS revenue requirement by total intrastate end-user revenues of all TRS contributors (minus intrastate revenues attributable to states that do not self-administer IP CTS). Under this alternative approach, the contribution factors for interstate and intrastate IP CTS, respectively, would not be the same because the IP CTS revenue requirement would be allocated between the separate jurisdictions based on the percentage of *IP CTS minutes and provider costs* attributed to each jurisdiction, while the contribution base would be allocated based on the percentage of *end-user revenues* allocated to each jurisdiction.

## **2. Pa. PUC Comments**

The Pa. PUC supports the Commission's efforts to focus on the waste and abuse in IP CTS and encourages the Commission to continue to examine the factors contributing to the rapidly increasing size and costs for the program. The Pa. PUC believes such Commission action is entirely consistent with the Commission's TRS oversight and certification authority under Sections 225(b)(1) and 225(f) of the Act, 47 U.S.C. §§ 225(b)(1) and 225(f).

However, the Commission proposes to expand the contribution base for IP CTS to include a percentage of annual intrastate revenues from telecommunications carriers and VoIP service providers. The Pa. PUC has reservations regarding the Commission's proposals to expand the IP CTS contribution base or cost allocations and administration to include a percentage of annual intrastate revenues from telecommunications carriers and VoIP service providers. The Pa. PUC's reluctance is due to the current uncertainty regarding the legal classification of VoIP and IP technology generally as well as the need to address compliance with the required Separations referral arising under Section 410 given Section 225(d)(3).

The regulatory uncertainty regarding whether IP CTS, which is an IP-enabled service, is an information service or a telecommunications service, raises the question as to whether IP CTS calls should be reimbursed by a state or the Interstate TRS Fund. Since IP CTS is based on the Internet, the issue of determining what cost allocation mechanism should be adopted to determine which IP Relay calls are interstate, and therefore compensable from the Interstate TRS Fund, and which calls are intrastate, impacts the Commission's proposal to expand the TRS Fund's contribution base for all TRS to include intrastate revenues. Such recovery must be consistent with the parallel jurisdictional classification of these services.

However, absent a jurisdictional classification, without first determining the appropriate costs of the IP CTS program and without any state-specific data on the amount of IP CTS costs to be allocated to each state, including Pennsylvania, the Pa. PUC is reluctant to support any proposal to include a percentage of annual intrastate revenues as an IP CTS funding source. In the *2007 IP CTS Declaratory Ruling*, the Commission determined that *all* IP CTS calls should be compensated from the Interstate TRS Fund until such time as the Commission adopted jurisdictional separation of costs for



this service.<sup>11</sup> Accordingly, the Pa. PUC submits that any proposal to expand the interstate TRS fund base and include a percentage of annual intrastate revenues should be enacted in accordance with the statutory requirements under federal law regarding jurisdictional cost allocations, which in this case includes a referral to the Federal-State Joint Board on Separations (Separations Joint Board) to determine the appropriate jurisdictional separations under Section 410 of the Act.<sup>12</sup>

Section 225 of the Act requires the Commission to ensure that TRS is available, to the extent possible and in the most efficient manner, to persons with hearing or speech disabilities in the United States. 47 U.S.C. § 225. The statute requires that TRS offer persons with hearing and speech disabilities access to a telephone system that is "functionally equivalent" to voice telephone service.<sup>13</sup> The statute also requires the Commission to ensure that interstate and intrastate programs facilitate TRS and to certify that state programs are compliant with that federal mandate. 47 U.S.C. § 225(b)(1); 47 U.S.C. § 225(f).

Additionally, the statute requires that consumers cannot be required to pay for the costs of relaying TRS calls.<sup>14</sup> Hence, the statute creates a cost recovery regime whereby providers of TRS are compensated for their costs of providing TRS.<sup>15</sup> As a general matter, the statute prescribes that the costs of providing *intrastate* TRS are recovered by each state. With respect to *interstate* TRS, eligible TRS providers are compensated from the Fund for the costs of providing eligible TRS services.<sup>16</sup> Consequently, the Pa. PUC takes no issue with the Commission's determination that it has the statutory authority to

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<sup>11</sup> 2007 IP CTS Declaratory Ruling, 22 FCC Rcd at 390-91, paras. 25-28.

<sup>12</sup> 47 U.S.C. § 410.

<sup>13</sup> 47 U.S.C. § 225(a)(3).

<sup>14</sup> 47 U.S.C. § 225(d)(1)(D) (TRS users cannot be required to pay rates "greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination").

<sup>15</sup> 47 U.S.C. § 225(d)(3).

<sup>16</sup> See 47 U.S.C. § 225(d)(3); 47 C.F.R. § 64.604(c)(5).

promulgate regulations regarding the cost recovery of the costs of intrastate IP CTS, as well as to support the provision of intrastate video relay service (VRS) and intrastate IP Relay calls.

Congress specifically directed the Commission to prescribe TRS regulations governing the jurisdictional separation of the associated costs, which shall “generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction.”<sup>17</sup> Nevertheless, the Commission made the ultimate determination that on an interim basis, *all* IP CTS calls be compensated from the Interstate TRS Fund.<sup>18</sup> Thus, at this time, both interstate and intrastate minutes are compensated from contributions from the Interstate TRS Fund but only with contributions remitted into the federal TRS Fund by interstate TRS providers.

Notwithstanding, the Pa. PUC notes that the Commission stated that it intended to revisit the cost recovery methodology for IP CTS in the future, including jurisdictional separation of costs. Accordingly, the Pa. PUC has reservations about the manner in which the relevant costs may be allocated between the federal and state jurisdictions. Specifically, the Pa. PUC has reservations with the Commission’s seeking to use or recover intrastate revenues for IP CTS calls without adequately apportioning and determining the intrastate portion for IP CTS. The Pa. PUC is opposed to the Commission’s using an

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<sup>17</sup> See 47 U.S.C. 225(d)(3)(B); 47 CFR § 64.604(c)(5)(iii)(A).

<sup>18</sup> See *2007 IP CTS Declaratory Ruling*, 22 FCC Rcd at 390-91, paras. 25-28. This approach was consistent with the Commission’s treatment of other types of Internet-based TRS, namely VRS and IP Relay. See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, 5153, para. 24 (2000) (authorizing such “special funding” for VRS on an interim basis “to speed its development”); *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Petition for Clarification of WorldCom, Inc.*, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 7779, 7786, para. 20 (2002) (authorizing same to encourage the development of IP Relay service).

estimate of the proportion of interstate and intrastate IP CTS costs and minutes to determine the contributions needed from each TRS Fund contributor to support IP CTS in the absence of record evidence sustaining that allocation. Therefore, the method of calculating the state/federal allocation should not be based on an estimated or assumed 60/40 split as proposed in the *FNPRM* or, at a minimum, without prior referral to the Separations Joint Board as required by Section 410 and 225(d)(3)(A) of the Act.

Generally, the LEC's costs must be properly assigned between the state and interstate jurisdictions. According to Section 225 of the Act, the Commission's prescription of rules governing jurisdictional separation of TRS costs must be consistent with section 410 of the Act. 47 U.S.C. § 225(d)(3)(A). Section 410 of the Act, in addition to authorizing the use of Joint Boards as the Commission deems appropriate, states that the Commission "shall refer any [NPRM-initiated] proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations" to a Joint Board. 47 U.S.C. § 410(c).

In order to expand the TRS Fund contribution base for support of IP CTS to now include intrastate revenues, the Pa. PUC recommends that the Commission abide by its jurisdictional separations procedures and the requirements of Section 410 and 225(d)(3)(A) to ensure that the burden of TRS Fund contributions is distributed equitably among the federal and state jurisdictions and among all appropriate service providers.

The Pa. PUC notes that the alternative approach to expanding the contribution base is more in line with the current separations process, which requires carriers to apportion regulated costs among categories of plant and expenses between the intrastate and interstate jurisdictions. But, again, in the absence of a referral pursuant to Section 410 and 225(d)(3)(A), 47 U.S.C. §§ 225(d)(3)(A) and 410, the Pa. PUC cannot conclusively determine that the proposed cost allocations comply with federal law.

Moreover, since there is a lack of cost information regarding the use of intrastate funding to move forward with the alternative approach, the Pa. PUC suggests that pursuant to Section 410 of the Act,<sup>19</sup> the Commission refer this matter to the Separations Joint Board first to obtain the necessary data required to determine if the states should remit contributions from telecommunications carriers' and VoIP service providers' intrastate end-user revenues to support the provision of intrastate IP CTS calls.

## **B. State Role In The Administration Of IP CTS**

### **1. Commission Proposal**

Under Section 225(c) of the Act, common carriers may fulfill their obligation to offer TRS throughout the areas in which they offer telephone service “individually, through designees, through a competitively selected vendor, or in concert with other carriers,” or by complying with the requirements of state TRS programs certified by the Commission.<sup>20</sup> Currently, all 50 states plus six U.S. territories have TRS programs certified by the Commission.<sup>21</sup> Thus, IP CTS is entirely administered by the Commission.

The Commission seeks further comment on whether certified state TRS programs should be allowed or required to take a more active role in the administration of IP CTS. The Commission believes that given the states' responsibility for administering other forms of TRS (including CTS) and their greater proximity to residents using IP CTS within their jurisdiction, state TRS programs have the expertise, demonstrated skills, and on-the-ground experience to assume administrative functions with respect to IP CTS.

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<sup>19</sup> 47 U.S.C. § 410.

<sup>20</sup> 47 U.S.C. § 225(c).

<sup>21</sup> The Pennsylvania TRS is certified by the Commission through June 2023.

## 2. Pa. PUC Comments

Traditionally, the Commission has authority to regulate interstate and foreign telecommunications services, while the states retain jurisdiction over intrastate telecommunications services. 47 U.S.C.S. §§ 151, 152(b). The Pa. PUC agrees that states have the expertise, demonstrated skills, and on-the-ground experience to assume administrative functions with respect to intrastate IP CTS. As one example, states that have programs to provide accessible equipment to low-income persons who use CTS may need to restructure those programs if intrastate IP CTS becomes a state responsibility. Nevertheless, the Pa. PUC is reluctant to support this proposal without first identifying the specific functions that the states would be assuming or without an explanation as to what specifically state-level administration would entail. For example, questions remain as to whether states would certify IP CTS providers or have multiple providers of IP CTS. Moreover, state commissions should not be expected to take on greater oversight or administrative duties of IP CTS for their respective state TRS programs until the Commission has addressed issues related to user eligibility, uncontrolled growth of IP CTS demand, and standards of service.

Further, the Pa. PUC notes that some states may need legislation or amendments to existing legislation before they have the authority to administer IP CTS. Pennsylvania for example has the VoIP Freedom Act of 2008,<sup>22</sup> which generally prohibits the Pa. PUC from regulating the rates, terms, and conditions of IP-enabled retail voice service. However, Pennsylvania's VoIP Freedom Act contains certain exceptions under which the Pa. PUC retains authority to regulate.<sup>23</sup> Specifically, the Pa. PUC retains authority under the VoIP Freedom Act to regulate telecommunications relay service fees.<sup>24</sup> Consequently, if the Commission's proposal that the states should take a more active role in the

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<sup>22</sup> 73 P.S. § 2251.4.

<sup>23</sup> *Id.* § 2251.6.

<sup>24</sup> *Id.* § 2251.6(1)(ii). *See also* 35 P.S. §§ 6701.2 (telecommunications relay service) and 6701.4 (establishment of dual party relay service).

administration of the intrastate aspects of IP CTS entails collecting or remitting funds for IP CTS to the federal TRS Administrator to place in the Interstate TRS Fund, then the Pa. PUC arguably is authorized to do so under state law. However, if the Commission's proposal that the states should take a more active role in the administration of the intrastate aspects of IP CTS includes functions beyond fee administration, then the Pa. PUC will need to examine its available statutory mandate in more detail in order to ascertain whether it can perform those additional functions.

The Pa. PUC notes that the Commission considers Internet traffic inherently interstate in nature. As such, it is regulated at the federal level. Pursuant to that line of reasoning, the existing TRS paradigm works if the Commission itself continues to administer and direct the remittance of both interstate and intrastate IP CTS costs to the federal TRS Administrator.<sup>25</sup> Currently, the costs of all IP Relay, VRS, and IP captioned telephone service calls are compensated from the Interstate TRS Fund, while the costs of intrastate TRS generally are recovered by the states through rate adjustments or surcharges on local phone bills.

However, in the *FNPRM*, the Commission contends that Section 225 of the Act authorizes the classification of some IP CTS calls as jurisdictionally intrastate.<sup>26</sup> Based upon this reasoning, the Commission is proposing that the states should take a more active role in the administration of the intrastate aspects of IP CTS.<sup>27</sup> The Pa. PUC contends that it is premature to have states assume responsibility for IP CTS in the absence of a Section 410 referral and a resolution of the inconsistency between allocating

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<sup>25</sup> The Commission also extended the disability access requirements of Section 255 of the Act to providers of interconnected VoIP services and to manufacturers of specially designed equipment used to provide these services. In addition, this order extended the TRS requirements to providers of interconnected VoIP services. *See In Re IP-Enabled Services Implementation of Sections 255*, 22 FCC Rcd 11275 (2007).

<sup>26</sup> *FNPRM* at 53, para. 110.

<sup>27</sup> In addition to funding questions, there are also questions of reporting requirements, quality of service, and dispute resolution.

IP CTS costs and administration to the states as a telecommunications service under Section 225 with the treatment of the underlying technology and services as interstate information service.

For jurisdictional purposes, the Commission has classified nomadic VoIP service as an unregulated *information service* that should be regulated at the federal level to the extent the service is not offered to the public for compensation and does not rely on access to the Public Switched Network (PSN).<sup>28</sup> But, there is still an unresolved issue concerning whether the Commission has definitively classified interconnected VoIP as an information or telecommunications service.<sup>29</sup> The Pa. PUC notes that with one exception, VoIP has yet to be classified as an interstate information service or a telecommunications service under federal law. The exception is the 8<sup>th</sup> Circuit, which recently ruled that VoIP is an information service notwithstanding the lack of Commission action on the legal classification.<sup>30</sup> The Pa. PUC notes that the regulatory

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<sup>28</sup> See *Petition for Declaratory Ruling That Pulver.Com's Free World Dialup is Neither Telecommunications Nor A Telecommunication Service*, 19 FCC Rcd 3307 (2004); *Accord Comcast IP Phone v. Missouri Public Service Commission*, Case No. 06-4233-CV-C-NKL (W.D.Mo January 18, 2007).

<sup>29</sup> *Compare Comcast IP Phone v. Missouri Public Service Commission*, Case No. 06-4233-CV-C-NKL (W.D.Mo. January 18, 2007) and *In re Vonage Holdings Corp.*, 19 FCC Rcd 22404 (2004), *aff'd*, *Minn. Public Utilities Comm'n. v. FCC*, 483 F.3d 570 (8th Cir. 2007) (*Vonage*) (Without classifying Vonage's service as either an "information service" or a "telecommunications service" under the Act, the Commission held that DigitalVoice cannot be separated into interstate and intrastate communications for compliance with Minnesota's requirements without negating valid federal policies and rules.).

<sup>30</sup> *Charter Advanced Services (MN), LLC, et al. v. Minn. PUC*, Case No. 17-2290, (8<sup>th</sup> Cir. September 7, 2018).

classification of VoIP service is important because it impacts how and by whom VoIP service, including IP CTS, may be regulated.<sup>31</sup>

The Pa. PUC notes that the Commission has imposed some Title II regulation on VoIP services in a piecemeal fashion without deciding whether the service is a telecommunications or information service.<sup>32</sup> For example, the Commission withdrew from its initial signal of pervasive preemption of state regulation of VoIP service when it ordered VoIP providers to contribute to the federal Universal Service Fund (USF).<sup>33</sup> In that ruling, the Commission indicated that an interconnected VoIP provider with the capability of tracking the jurisdictional confines of customer calls might not fall within the preemption piece of the *Vonage* Order and instead would be subject to state regulation. The same decision also permitted the contribution assessment of fixed VoIP intrastate revenues by state USF mechanisms, and the FCC explicitly expanded the scope of such assessments to nomadic VoIP intrastate revenues as well under certain

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<sup>31</sup> There are two categories for interconnected VoIP classification under the Act. The first is an “information service” classification, which exempts VoIP from regulation unless the FCC acts pursuant to its ancillary jurisdiction under Title I of the Act of 1934, as amended (Act). However, the FCC cannot rely on Title I ancillary authority alone to enforce or implement any Commission decision. *See Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). The second is a “telecommunications service” classification, which subjects VoIP to regulation under Title II of the Act. There is continuing uncertainty on this issue. *Compare Comcast IP Phone v. Missouri Public Service Commission*, Case No. 06-4233-CV-C-NKL (W.D.Mo January 18, 2007) and *In re Vonage Holdings Corp.*, 19 FCC Rcd 22404 (2004), *aff’d*, *Minn. Public Utilities Comm’n. v. FCC*, 483 F.3d 570 (8th Cir. 2007). The ultimate classification of these services is significant to the extent that “telecommunications services” generally are subject to a comprehensive, public utility-type or common carrier regulatory regime, while “information services” generally are subject to more limited regulation by the Commission.

<sup>32</sup> *See In Re IP-Enabled Services—E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, 10262 (2005) (E911 Order), *aff’d sub nom.*, *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2007); *see Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 6227 (2007) (CPNI Order); *see Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM-10865, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 14991-92, para. 8 (2005) (*CALEA First Report and Order*), *aff’d*, *American Council on Education v. FCC*, 451 F.3d 226 (D.C. Cir. 2006).

<sup>33</sup> *See Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7546 (2006) (*USF Order*) *aff’d in part, vacated in part*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007).



conditions.<sup>34</sup> These decisions suggest that there may be room for state regulation; however, the Pa. PUC notes that it is difficult to reconcile this suggestion with the Commission's determination in the prior *Vonage Order* that state regulation would interfere with valid federal rules and policies and the court's subsequent determinations that the scope of that preemption was limited to nomadic VoIP as opposed to fixed VoIP.<sup>35</sup>

Moreover, the Commission recently revisited the classification of Basic Internet Access Service (BIAS) as an interstate information service as opposed to an interstate telecommunications service. The *USTA v. FCC* decision in 2016 upheld yet another classification for IP networks and services. While the *USTA v. FCC* decision may uphold imposition of Title II-like mandates previously upheld in the reversed *Comcast* decision, that reliance is uncertain now given the current appeal of the *Restoring Internet Freedom Order*. Without taking a position on those developments in this proceeding, the Pa. PUC submits that the Commission needs to address a legal inconsistency arising from treating IP CTS as a telecommunications service subject to allocating costs and administration to the states with the fact that the underlying technology (Internet Protocol) and services (IP CTS and BIAS) are now interstate information service largely within the Commission's jurisdiction.

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<sup>34</sup> *In re Universal Service Contribution Methodology; Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, WC Docket No. 06-122, (FCC, Rel. Nov. 5, 2010), FCC 10-185, 25 FCC Rcd 15651.

<sup>35</sup> *Compare Comcast IP Phone v. Missouri Public Service Commission*, Case No. 06-4233-CV-C-NKL (W.D.Mo January 18, 2007) and *In re Vonage Holdings Corp.*, 19 FCC Rcd 22404 (2004), *aff'd*, *Minn. Public Utilities Comm'n. v. FCC*, 483 F.3d 570 (8th Cir. 2007). We also note that the recent decision of the U.S. Court of Appeals for the 8th Circuit unilaterally declaring that VoIP services are "information services" — while acknowledging that the FCC has not proceeded with such a classification — may further complicate matters. *Charter Advanced Services (MN), LLC, et al. v. Minn. PUC, slip op.* (8<sup>th</sup> Cir., No. 17-2290, Sept. 7, 2018). The Pa. PUC recognizes that a determination in the 8<sup>th</sup> Circuit jurisdictional province is not necessarily binding in the 3<sup>rd</sup> Circuit in which federal appeals arising from decisions of the Pa. PUC are determined. *See, e.g., AT&T Corp., et al. v. Core Communications, Inc. and the Pa. PUC*, Nos. 14-1499 & 14-1664 (3<sup>rd</sup> Cir. 2015). Moreover, the Pa. PUC operates under its own independent state statutory authority that includes Pennsylvania's 2008 VoIP Freedom Act, 73 P.S. § 2251.1 *et seq.*

The Pa. PUC is concerned that the Commission's failure to provide a clear classification IP-enabled services, while at the same time, suggesting that Section 225 authorizes the classification of some IP CTS calls as jurisdictionally intrastate is problematic given the uncertainty due to the pending *Restoring Internet Freedom Order* decision.<sup>36</sup> The fundamental legal concern at issue in these decisions is the classification of IP technology and networks that provide services that rely on IP technology. This includes IP CTS. At a minimum, the Pa. PUC urges the FCC to refrain from further action in this proceeding until that appeal is resolved and the underlying Section 410 and 225(d)(3)(A) Separations referrals are completed.

Given the uncertainty and ambiguity as to whether VoIP service is a telecommunications or information service, a question remains as to whether states have the authority to regulate VoIP services, which includes IP CTS. The ambiguity problem is only compounded by the Commission's approach to classifying IP technology and services provided over networks that rely on IP technology.<sup>37</sup> These questions need to be resolved before the states are required to move forward under presumed intrastate authority (statutory and/or regulatory) to implement any new IP CTS responsibilities imposed by the proposed changes.

### **III. Conclusion**

The Pa. PUC is reluctant to fully support any of the Commission's proposals to expand the IP CTS contribution base or cost allocations and administration to include a percentage of annual intrastate revenues from telecommunications carriers and VoIP service providers and for states to take a more active role in the administration of IP CTS.

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<sup>36</sup> *USTA v. FCC* (D.C.C.A.), Docket No. 15-1073, affirmed 6/14/16; *Restoring Internet Freedom*, Declaratory Ruling, Report and Order (*Restoring Internet Freedom Order*), WC Docket No. 17-108, FCC 17-166 (Released on January 4, 2018), appeal pending.

<sup>37</sup> The Pa. PUC observations here are equally applicable to networks and providers that rely on technology akin to IP, such as Docsys 3.0, given that these divergent technologies need to interconnect with the PSN as the PSN becomes an increasingly IP-centric network.

The Pa. PUC's reluctance is due to a lack of important information and details that are materially relevant to these issues. The reluctance also arises from the current uncertainty regarding the legal classification of VoIP and IP technology generally as well as the need to address compliance with the required Separations referral arising under Section 410 given Section 225(d)(3).

If, however, the Commission elects to expand the IP CTS contribution base to include a percentage of annual intrastate revenues from telecommunications carriers and VoIP service providers for the TRS Fund, the Commission must first refer the matter to the Federal-State Joint Board on Separations for its expertise in determining accurate separations of costs between interstate and intrastate revenues and to develop a cost-based compensation rate. This is a necessary prerequisite under Section 225(d)(3).

The Commission should also work with the states to ensure they have the requisite and appropriate legal authority and data and information necessary to ascertain whether they should play a larger role in the administration of IP CTS.

The Pa. PUC appreciates this opportunity to file comments in this proceeding.

Respectfully submitted,

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